

Vinson&Elkins

Carol E. Dinkins cdinkins@velaw.com
Tel +1.713.758.2528 Fax +1.713.615.5311

December 16, 2013

By Email & Overnight Delivery

Sarah P. Flanagan, Esq.
Assistant Regional Counsel
USEPA
Office of Regional Counsel, Region 2
290 Broadway, 17th Floor
New York, NY 10007-1866

Stephanie Vaughn
Remedial Project Manager
USEPA Region 2
290 Broadway
New York, NY 10007-1866

Re: Diamond Alkali, Lower Passaic River Study Area River Mile 10.9
Unilateral Administrative Order for Removal Response Activities
US EPA Region 2 CERCLA Docket No. 02-2012-2020 (the Order).

Dear Ms. Flanagan and Ms. Vaughn:

Thank you for your letter of December 12, 2013. This letter responds on behalf of our clients, Occidental Chemical Corporation (Occidental), Maxus Energy Corporation (Maxus) and Tierra Solutions, Inc. (Tierra).¹ As we have indicated throughout this process, Occidental, Maxus and Tierra remain committed to complying with the UAO to achieve EPA's objectives and think the project should be completed in the safest, most effective manner possible.

Occidental is not refusing and has not refused to comply with the UAO. As our December 10, 2013 letter demonstrates, Tierra, on behalf of Occidental, has at all times complied with the UAO, as instructed by EPA, and it will continue to do so. Our letter, and position at the meeting, was intended to propose methods by which Tierra, on behalf of Occidental, could do so and to identify problems and difficulties with the approach initially suggested by EPA. Our clients remain convinced that EPA's proposed approach has flaws that are not limited to inefficiency and increased expense, but also involve likely delays,

¹ Reference to Tierra also refers to its corporate affiliate, Maxus Energy Corporation, each of which acts on behalf of Occidental Chemical Corporation, pursuant to contractual arrangement.

safety concerns and operational complications in performing the work that would result from a substitution of the performing party at this late date.

As your December 12, 2013 letter observes, the UAO provides Occidental with two courses of action: performance of work or payment for work: "To establish compliance, Occidental can either perform part of the removal action, or pay for work." While Tierra, on behalf of Occidental, is not presently willing to commit to perform the work, for the reasons discussed earlier and summarized below, it will do what EPA has stated would constitute Occidental's compliance with the UAO: "paying for removal work[.]"

To that end, Tierra, on behalf of Occidental, proposes an approach whereby it provides funds to reimburse Settling Parties' actual costs for the work involved in performing the two projects set forth in EPA's October 22, 2013 letter. Tierra, on behalf of Occidental, would provide funds up to the amount EPA set as its financial assurance obligation in the UAO, \$5 million, less its actual costs for preserving the UPF as an option for the RM 10.9 removal action, as requested by EPA. While the final amount of the UPF costs is not clear, we estimate that the amount available to reimburse the Settling Parties for these projects would be approximately \$3.6 million.

Due to the difficulties our clients have had with the Settling Parties, we propose that these funds be deposited into an EPA Special Account, to be reimbursed by EPA upon Settling Parties' demonstration to EPA's satisfaction that the work has been performed. In keeping with past practice on the Lower Passaic River, we propose to fund this special account over time via three payments in December 2013, July 2014, and January 2015.

We believe that this is a reasonable proposal to fulfill the obligations under the UAO. This proposal would provide a substantial amount of funding for these projects. Providing funding, rather than performing the work directly, would allow for the projects to be performed much more quickly and with a lower level of operational risk, than if Tierra, on behalf of Occidental, were to be substituted as the performing party at this late date. The Settling Parties' existing contracts and relationships necessarily allow them to perform this work more quickly than if Tierra, on behalf of Occidental, were required to assemble a new team, and given that the RM 10.9 work is part of a Time-Critical Removal Action, this proposal is in EPA's best interest as well as Occidental's.

Further, given that Settling Parties' contractors have already been in the field performing work, there is less risk of an incident occurring if the Settling Parties continue

this work rather than Tierra, on behalf of Occidental, performing work with new contractors. The Settling Parties' continuity will reduce the risk of accidents or errors due to misunderstanding or lack of communication. Again, avoiding such problems is in EPA's interest as much as it is Occidental's.

Finally, the substantial funding offer set forth in this proposal should allay any EPA concern that Occidental is not committed to compliance with the UAO or is attempting to unreasonably avoid its obligations, and EPA should not concern itself with allocation issues between the parties in light of a proposal that guarantees funds will be available to accomplish the RM 10.9 removal action in the most expeditious manner possible.

Our clients remain willing to discuss these issues at your convenience. To clarify our position (which may have been unclear in earlier correspondence), Occidental is not refusing to comply with EPA's requested action. We merely remain concerned that EPA's proposed approach creates unnecessary risks, safety concerns and delays and that there are better alternatives, including the one set forth in this letter. We are willing to consider other approaches as well.

Very truly yours,



Carol E. Dinkins